

STATE OF NEW JERSEY  
Department of Law and Public Safety  
DIVISION OF ALCOHOLIC BEVERAGE CONTROL  
NEWARK INTERNATIONAL PLAZA  
U.S. Routes 1-9 (Southbound) Newark, N. J. 07114

BULLETIN 2390

February 27, 1981

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STATE OF NEW JERSEY  
Department of Law and Public Safety  
DIVISION OF ALCOHOLIC BEVERAGE CONTROL  
NEWARK INTERNATIONAL PLAZA  
U.S. Routes 1-9 (Southbound) Newark, N. J. 07114

BULLETIN 2390

1. APPELLATE DECISIONS - GEORGE MICHAELS RESTAURANT, INC. v. LODI.

#4382		OAL DKT. No. ABC 4257-79
GEORGE MICHAELS RESTAURANT, INC., a N.J. CORP.,	)	
	)	
Appellant,	)	
	)	
v.	)	ON APPEAL
	)	CONCLUSIONS
	)	AND ORDER
BOROUGH COUNCIL OF THE BOROUGH OF	)	
LODI,	)	
	)	
Respondent.	)	

-----  
Jeffrey J. Grenell, Esq., Attorney for Appellant  
Carbonetti & DiMaria, Esqs., by John M. DiMaria, Esq., Attorneys for Respondent

Initial Decision Below

Hon. Arnold Samuels, Administrative Law Judge

Dated: February 15, 1980 - Received February 19, 1980

BY THE DIRECTOR:

No written Exceptions to the Initial Decision below were filed by the parties hereto pursuant to N.J.A.C. 13:2-17.14.

Having carefully considered the entire record herein, including the transcript of testimony, the exhibits, and the Initial Decision, I concur in the findings and recommendations of the Administrative Law Judge, and adopt them as my conclusions herein.

Accordingly, it is, on this 20th day of March, 1980,

ORDERED that the action of the respondent Borough Council of the of the Borough of Lodi be and the same is hereby reversed; and it is further

ORDERED that the said respondent is hereby directed to grant appellant's application for a person-to-person and place-to-place transfer of Plenary Retail Consumption License No. 0231-33-045-001 in accordance with the application made therefor.

Joseph H. Lerner  
Director

APPENDIX - INITIAL DECISION BELOW

GEORGE MICHAELS RESTAURANT, )  
 INC., t/a GEORGE MICHAELS )  
 DINER )  
 v. )  
 BOROUGH COUNCIL OF THE )  
 BOROUGH OF LODI )

INITIAL DECISION

OAL DKT. NO. ABC 4257-79  
 AGENCY DKT. NO. 4382

APPEARANCES:

John M. DiMaria, Esquire, attorney for Respondent,  
 Borough Council of the Borough of Lodi

Jeffrey J. Grenell, Esquire, attorney for Appellant,  
 George Michaels Restaurant, Inc.

WITNESSES:

For Respondent:

William E. Jerlat  
 John Palino

For Appellant:

Michael Kumaras  
 Harry Baker

BEFORE THE HONORABLE ARNOLD SAMUELS, A.L.J.:

The appellant, George Michaels Restaurant, Inc., t/a George Michaels Diner, applied to the respondent, Borough Council of the Borough of Lodi, for a person-to-person and place-to-place transfer of plenary retail consumption license number 0231-33-045-001. By resolution dated June 14, 1979 the respondent denied the transfer, based upon the appellant's alleged inability to comply with a Borough ordinance that prohibits issuance or transfer of a plenary retail consumption license to an applicant whose premises would be located within 500 feet or less from an already existing license. An appeal was filed by the applicant alleging that the respondent improperly

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interpreted and applied the ordinance in measuring the distance between the applicant's premises and another existing licensee.

The matter was transmitted to the Office of Administrative Law as a contested case pursuant to N.J.S.A. 52:14F-1 et seq. A hearing was held on December 4, 1979 in the Bergen County Court House, Hackensack, New Jersey. Post-hearing briefs and memoranda were filed by the parties and the record was closed on January 22, 1980. The following exhibits were marked in evidence:

- J-1 Ordinance No. 925, Borough of Lodi, adopted 10/1/62.
- J-2 Certified copy of Resolution No. 79-95 of the Borough Council of the Borough of Lodi, adopted 6/14/79
- J-3 Copy of one page of tax map of Borough of Lodi
- A-1 Photograph
- R-1  
thru
- R-6 Six photographs

The sole issue to be decided is whether the applicant's premises are located more than or less than 500 feet from another licensed premises (The Cottage Inn). The answer to this question depends upon how the distance between the two premises should be measured. The method of measurement depends upon an interpretation of the relevant portion of the Borough ordinance. The parties stipulated that, except for the above dispute, all other proceedings in the application process were properly taken and no other impediments existed in connection with the application.

Ordinance No. 925 (J-1 Evid.) provides as follows, in pertinent part:

"Section 1. No plenary retail consumption liquor licenses or plenary retail distribution liquor license except renewals for the same premises and transfer of licenses from person-to-person within the same premises shall be granted, or transferred to other premises within a distance of 500 feet from any other premises then covered by, (a) any other plenary retail consumption liquor license, (b) or any plenary distribution liquor license, provided, however, that a transfer shall be granted for any existing license to the same licensee only, to the other premises within 750 feet of the premises from which the transfer is made, notwithstanding that the license so transferred is within 500 feet of an existing plenary retail

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consumption or distribution liquor license, provided, however, that such transfer shall be made in good faith and shall be solely for the benefit of the same licensee.

Section 2. The aforesaid 500 feet as set forth in Section 1 above shall be measured in the normal way that a pedestrian would properly walk from the nearest entrance of licensed premises to the nearest entrance of the premises sought to be licensed. ... "

How should the 500 feet be measured - "in the normal way that a pedestrian would properly walk" from the nearest entrance of an already licensed premises (The Cottage Inn) to the nearest entrance of the premises sought to be licensed (Michaels Diner)?

The two premises involved are located on opposite sides of U. S. Highway #46. If the measurement is made on a direct straight line across the road (the method used by the Borough of Lodi) then the two premises are no more than 200 or 300 feet from each other and the ordinance would be violated if the transfer of license is granted to the applicant. On the other hand, if the measurement is made by going east or west along one side of the highway, approximately one-half mile to a vehicular turn-around, and then back one-half mile along the other side of the highway (as urged by the appellant) then the two premises would be approximately one mile (5,280 feet) apart, and the ordinance would not be violated by issuance of the license. These approximate distances are not in dispute, having been stipulated by the parties (T-81).

William E. Jerlat, President of the South Bergen County Licensed Beverage Association, testified for the respondent regarding the intent of the Borough when the ordinance was passed 17 years ago. Mr. Jerlat had assisted in drafting the ordinance. Prior to 1962 Route 46 in Lodi was known as the "Sin Strip" due to the large number of bars and taverns, on both sides of the highway, catering to undesirable elements who moved back and forth across the highway from one bar to another (T 21, 22). The problems caused by the "Sin Strip" culminated in the shooting and killing of two policemen in one of the bars. The Borough then passed the ordinance in question, in an attempt to clean up the strip. According to Mr. Jerlat, the ordinance has served its purpose. Ten or twelve bars in 1962 have been reduced to five licensed establishments now located on the same length of highway, and all of them are characterized as restaurants instead of merely bars or taverns (T 25-30).

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John Palino is a principal in the Cottage Inn, located directly across Route 46 from Michaels Diner. The Cottage Inn has been holder of a plenary retail consumption liquor license in the same location for 25 years. Mr. Palino testified that people often cross Route 46 on foot, going directly from his premises to Michaels Diner. According to Mr. Palino, many of his customers regularly walk across the road to the diner for coffee or breakfast. Truck drivers park on his premises and go across also. There is a trailer park adjacent to the diner, and Mr. Palino sees children who live there cross the highway every school day to go home after being dropped off by the school bus. In the morning, the same children cross Route 46 to wait for the bus. In addition, people alighting from commuter buses cross the highway. Mr. Palino also testified that in the summer, employees of Michaels Diner purchase ice from his establishment. They walk across Route 46 with an empty barrel and return the same way after he fills it for them with ice (T 37-40). Mr. Palino stated that the above situation has existed for all of the 25 years he has been there. He has never seen police stopping any of these pedestrians when they cross the highway.

A series of photographs were introduced into evidence illustrating the highway and the areas in question (R-1 thru R-6, A-1). Among other things shown in these photographs are school children alighting from a school bus and walking across the highway. No traffic control device, marked crosswalk or crossing guard is present.

An unbroken median strip or island divides the highway for many hundreds of yards in each direction in the vicinity of Michaels Diner and The Cottage Inn. The median strip is 5 to 6 feet wide and is paved with asphalt between concrete curbing. The paving is turtle-backed or convex, reaching a height in the center of approximately 8 to 10 inches from the road surface on either side. Route 46 is a major U. S. highway that traverses the entire State of New Jersey from east to west. Its speed limit in the heavily traveled four lane section in Lodi is 55 miles per hour, and there is no marked or controlled pedestrian crossing in sight in either direction near the two establishments involved (T 69).

Michael Kumaras, an officer of George Michaels Diner, Inc., testified that if he wanted to cross Route 46 near his diner without walking directly across the road, he would have to walk at least a quarter mile east or west to the nearest overpass or crossroad and then a quarter mile back, totaling approximately a half mile for the complete trip from his diner to The Cottage Inn (T 63-64). Mr. Kumaras also has seen people regularly crossing on foot. He acknowledged that it might be hazardous, but when his establishment needs ice they don't think of that. He opined that those who cross knowingly assume the risk of being hit by an automobile (T 70).

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Harry Baker is a licensed real estate broker who was produced by the appellant to testify more accurately to the distances and physical layout of Route 46. Mr. Baker indicated that the nearest pedestrian crossings to Michaels Diner are 7/10th of a mile in either direction, east or west (T 73).

In drafting Ordinance No. 925, the governing body clearly looked to a closely related State statute for a standard by which distance should be measured. N.J.S.A. 33:1-76 prohibits the sale of alcoholic beverages within 200 feet of any church or school. The statute further specifies the manner in which the 200 feet should be measured:

" ... Said two hundred feet shall be measured in the normal way that a pedestrian would properly walk from the nearest entrance of said church or school to the nearest entrance of the premises sought to be licensed. ..." N.J.S.A. 33:1-76.

The language of Ordinance No. 925 is identical in the above respect and no different or additional criteria for measurement are expressed in the ordinance. Therefore, the existing interpretation of the method of measurement applied by the Courts to N.J.S.A. 33:1-76 should be applied to Ordinance No. 925.

In each of the cases involving disputed methods of measurement under N.J.S.A. 33:1-76, the Courts have attempted to decide whether a route that might be taken by a pedestrian to get from Point A to Point B would be considered a proper route, or one by which "a pedestrian would properly walk". Once a route or routes have been declared to be proper then the shorter of two such proper routes would govern. Karam v. Alcoholic Bd. of Bev. Control of West Orange, 102 N.J. Super. 291 (App. Div. 1968).

The question was dealt with at length in Hopkins v. Municipal Board of Alcoholic Beverage Control of City of Newark, 4 N.J. Super. 484 (App. Div. 1949), where the Court ruled that it was "lawful" for pedestrians to cross a street within the confines of a "T" intersection, despite the fact that there was no traffic signal or marked crosswalk at that location. In Hopkins the Court cited Clarkson v. Ley, 106 N.J.L. 380 (E & A 1929), where the Court also discussed and referred to crossing at the intersection of streets.

In Presbyterian Church, etc. v. Div. of Alcoholic Beverage Control, 53 N.J. Super. 271 (App. Div. 1958) the Court held that the average pedestrian could rightfully assume that a painted crosswalk on a County road was authoritative and, therefore, such average pedestrian would properly follow the painted sidewalk, even though local

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police authorities had failed to obtain the approval of the Director of Motor Vehicles. The crosswalk was intended to be part of a County crosswalk traffic program.

The latest case to discuss the question was Karam et als v. Alcoholic Beverage Control, et al, supra, which was primarily decided because a wall was built as a device to compel people to walk around to a more distant entrance of a licensed premises, in order to artificially extend the distance between premises. In discussing the question of measurement, Karam refers to a route as being impermissible because of pedestrian safety.

All of the foregoing are concerned with whether a pedestrian route is proper or lawful. The Courts have looked for and found intersecting streets, or crosswalks painted by municipalities, to indicate normal pedestrian routes across the streets; which routes indicate some attempt at regulating safe and proper places at which pedestrians are normally expected to cross. None of these normal indicators of propriety or lawfulness are present in the case at hand.

N.J.S.A. 39:4-34 was cited by the Court in Hopkins, supra, to support approval of a proper crossing at the "T" intersection.

"Where traffic is not controlled and directed either by a police officer or a traffic control signal, pedestrians shall cross the roadway within a crosswalk or, in the absence of a crosswalk, and where not otherwise prohibited, at right angles to the roadway, and when crossing at a point other than at a crosswalk, shall yield the right of way to all vehicles on the roadway. It shall be unlawful for a pedestrian to cross any highway, having roadways separated by a medial barrier, except where provision is made for pedestrian crossing. ... "

N.J.S.A. 39:4-34.

The second sentence of the above statute is cited by the appellant here, who argues that it specifically renders crossing U.S. Highway 46 and its medial barrier in Lodi unlawful, where there is no provision for a proper pedestrian crossing.

There was some doubt expressed by counsel for the respondent as to whether the median strip involved in this matter can qualify as a "medial barrier", within the meaning of the above statute.

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A median strip is defined in Webster's Third New International Dictionary of the English Language, Unabridged, 1976 edition, as a "paved or planted strip of ground dividing a highway into lanes according to direction of travel." The word "medial" is defined as "being situated or occurring in the middle." The word "barrier" is defined as "an object that separates or keeps apart."

The obvious conclusion is that the median strip or island involved in this matter is a medial barrier as contemplated by the statute.

The Borough argues that those who cross Route 46 on foot are doing so in "the normal way that a pedestrian would properly walk" because some pedestrians regularly tempt the fates by making the crossing. Approval of such an interpretation by this Court would produce a strained result and would sanction continuation of an exceedingly dangerous practice by pedestrians, especially unaccompanied school children. The fact that the police do not enforce N.J.S.A. 39:4-34 by issuing summonses to persons crossing the road and its medial barrier does not render the pedestrian practice proper or lawful.

As an additional argument in favor of applying the 500 foot distance restriction to this situation, the respondent has shown that the intent of the ordinance, when passed in 1962, was to cut down on the number of bars and taverns on both sides of Route 46. It is contended that, if the 500 foot distance cannot be measured directly across the road, then the foregoing intent can be thwarted. Evidently the ordinance has not been challenged before in this regard and it has produced the desired result over the past 17 years. However, nowhere in the language of the ordinance is the above intent expressed or even implied. Section 2 of the ordinance clearly adopts the language of N.J.S.A. 33:1-76 in fixing the standard of measurement.

The Borough could easily have drawn the ordinance and the standard for measurement in a manner that would have expressed its intent, but it did not do so. The actual intent of the Borough, as testified to, is completely extrinsic from the language of the ordinance, which only parrots the foregoing state statute.

"... This Court is not free to indulge in a presumption arising from a subsequent extrinsic exposition, that the local governing body intended something other than what was expressed. ... Our Courts will interpret and enforce the legislative will as written and not according to some supposed unexpressed intention. ..." Petrangeli v. Barrett, 33 N.J. Super. 385, 386 (App. Div. 1954).

State v. Port Authority of N.Y. & N.J., 151 N.J. Super. at 137 (L. Div. 1977); Siegel v. Newark, 38 N.J. at 56 (1962).

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Having heard the testimony, observed the witnesses and reviewed the exhibits, the Court finds the following facts, by a preponderance of the credible evidence:

1. The foregoing discussion is incorporated herein by reference.
2. In June, 1979 the appellant, George Michaels Restaurant, Inc., t/a George Michaels Diner, applied for transfer of plenary retail consumption license number 0231-33-045-001 to its premises on U.S. Highway No. 46 in the Borough of Lodi.
3. U. S. Highway No. 46 at the above location is approximately 120 feet in width.
4. A restaurant known as The Cottage Inn is located directly across U. S. Highway 46 from Michaels Diner. The Cottage Inn is the holder of an existing plenary retail consumption liquor license.
5. The nearest entrance of Michaels Diner is approximately 200 - 300 feet from the nearest entrance of The Cottage Inn measured by the shortest distance directly across U. S. Highway 46.
6. Ordinance No. 925 of the Borough of Lodi prohibits the issuance or transfer of a plenary retail consumption license for premises within a distance of 500 feet from the premises of any already existing plenary retail consumption licensee. The ordinance states that the 500 feet shall be "measured in the normal way that a pedestrian would properly walk from the nearest entrance of licensed premises to the nearest entrance of the premises sought to be licensed."
7. The respondent, Borough Council of the Borough of Lodi denied the application for transfer, based upon its finding that the two premises are less than 500 feet apart, and that Ordinance No. 925 would be violated by issuance of the license. The Borough intended that the 500 foot measurement should be taken directly across the highway from one establishment to the other.
8. At the location in question, Route 46 is a four lane major highway, running east and west, heavily traveled, with a speed limit of 55 miles per hour.

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It is divided in the center by an island or median strip 5 to 6 feet wide, paved with asphalt between concrete curbing, having a maximum height in the center of 8 to 10 inches above the road surfaces on both sides.

9. The median strip and the highway is continuous and unbroken for at least one-half mile in both directions from the location of the George Michaels Diner and The Cottage Inn.
10. There are no traffic control devices, marked crosswalks or other visible provisions for pedestrian crossings over all of the distance of Route 46 described above.
11. Beyond the approximate half-mile of distances in both directions from the affected premises there are vehicular overpasses or crossroads that enable vehicles to exit Route 46 into other roads or turn back onto Route 46 going in the opposite direction. A round trip to Michaels Diner from The Cottage Inn or vice versa, by using either one of the vehicular overpasses or intersections in either direction would cover a distance of approximately one mile.
12. Various people regularly and habitually cross Route 46 and its median strip on foot, going directly to Michaels Diner from The Cottage Inn or vice versa. Such persons include those going from the restaurant to the diner for coffee or an early breakfast, truck drivers, commuters who alight from buses on each side of the highway, school children who are returning home or leaving on school buses, and employees of Michael's Diner who purchase ice from The Cottage Inn. When crossing the road in the above manner, all of the above persons walk only 200 to 300 feet from the nearest entrance of Michaels Diner to the nearest entrance of The Cottage Inn.
13. There is no traffic control device, marked crosswalk or other type of indicated pedestrian crossing at the above location. The flow of traffic on Route 46 is unrestricted, and those who cross do so at their peril by taking care to avoid oncoming vehicles.
14. Pedestrians crossing the median strip described above do so unlawfully, in violation of traffic regulations of the State of New Jersey, N.J.S.A. 39:4-34.

15. Persons crossing Route 46 on foot, going directly from The Cottage Inn on the north side of the highway to Michaels Diner on the south side of the highway, do not do so in the normal way that a pedestrian would properly walk.
16. There is no way that a pedestrian can properly walk to cross the highway at the location described above, except by using the same roundabout route normally used by motor vehicles. The nearest such overpass or turnaround is at least one-half mile from the two affected premises in either direction. That distance is far in excess of the 500 foot prohibition in the ordinance.

Under the foregoing facts and circumstances, this Court is constrained to follow the prevailing case law, as discussed above, in applying standards for measuring the distance between the two establishments on opposite sides of Route 46; and the reasonableness of the municipality's action must be viewed in the light of such standards. Fanwood v. Rocco, 33 N.J. 404, 414 (1960).

It is, therefore, CONCLUDED that:

The appellant has shown, by a preponderance of the credible evidence, that the municipality's exercise of judgment and discretion in denying the transfer of license to the appellant was not reasonable and was inconsistent with the state of existing case law applicable to the foregoing facts. Under such law, as applied to the facts of this case, the distance from the appellant's premises to the premises of the nearest licensed premises is more than 500 feet, when measured in the normal way that a pedestrian would properly walk. Ordinance No. 925 would not be violated by the transfer.

It is, therefore, ORDERED that the denial by the respondent of the appellant's application for person-to-person and place-to-place transfer of the license be reversed and the transfer should be approved.

This recommended decision may be affirmed, modified or rejected by the Director of the Division of Alcoholic Beverage Control, who by law is empowered to make a final decision in this matter. However, if the Director of the Division of Alcoholic Beverage Control does not so act in forty-five (45) days and unless such time limit is otherwise extended, this recommended decision shall become a final decision in accordance with N.J.S.A. 52:14B-10.

I HEREBY FILE with the Director of the Division of Alcoholic Beverage Control, Joseph H. Lerner, my Initial Decision in this matter and the record in these proceedings.

2. APPELLATE DECISIONS - BELLINO'S, INC. v. DEPTFORD.

#4390

Bellino's, Inc.,	:	CONCLUSIONS
	:	
Appellant,	:	
	:	AND
vs.	:	
	:	
Township Committee of the	:	ORDER
Township of Deptford,	:	
	:	
Respondent.	:	

-----  
 Joseph M. Nardi, Jr., Esq., Attorney for Appellant.  
 Martin A. Herman, Esq., Attorney for Respondent.

Initial Decision Below

Hon. Robert W. Scott, Administrative Law Judge

DATED: February 28, 1980

RECEIVED: March 7, 1980

BY THE DIRECTOR:

Appellant appeals from the action of the respondent Township Committee of the Township of Deptford, which, by Resolution dated June 14, 1979, denied appellant's application for renewal of its Plenary Retail Consumption License for the 1979-80 license period.

Upon Answer filed, the matter was set down for hearing in the Office of Administrative Law. However, prior to the commencement of the hearing, a "Consent Order", by which is meant a stipulation, was entered into between the parties hereto on February 28, 1980, wherein it was agreed that:

1. The appeal herein shall be dismissed;
2. That the respondent shall renew the said Plenary Retail Consumption License to the appellant for the 1979-80 license term; and
3. That the "Consent Order" shall not constitute a waiver of the right of the (respondent) to institute independent action for a cause against the Plenary Retail Consumption License of the said Bellino's, Inc.

Good cause appearing, I shall, pursuant to proper procedure in these matters, accept the sense of the aforesaid "Consent Order", by reversing the action of the respondent and directing it to grant appellant's application.

Accordingly, it is, on this 25th day of March, 1980,

ORDERED that the action of the respondent Township Committee be and the same is hereby reversed; and it is further

ORDERED that the respondent be and is hereby directed to grant the application for renewal in accordance with terms of the "Consent Order" entered into between the parties hereto; and it is further

ORDERED that the grant of the subject application, and the renewal of said license, shall not constitute a waiver of the right of respondent to institute appropriate disciplinary proceedings against appellant.

JOSEPH H. LERNER  
DIRECTOR

Appendix - Initial Decision Below

LARIO AND NARDI  
200 Haddon Avenue  
Haddonfield, New Jersey 08033  
(609) 795-4540  
Attorneys for Appellant

INITIAL DECISION

STATE OF NEW JERSEY  
OFFICE OF ADMINISTRATIVE LAW  
OAL DKT. NO. A.B.C. #4262-79  
AGENCY DKT. NO. 4390  
DIVISION OF A.B.C.

In re:

Bellino's Inc. :

vs. :

CONSENT ORDER

Township Commission of :

Township of Deptford :

This matter coming on before the Office of Administrative Law for a hearing of the Petition of Appeal by Bellino's, Inc. vs. Township of Deptford from the denial of Bellino's application for a Plenary Retail Consumption License for the period expiring June 30, 1980, by Respondent, Township of Deptford, for premises located at Clements Bridge Road, Deptford Township, New Jersey; and it appearing that this matter was scheduled for

hearing on Monday, November 19, 1979; and it appearing that the parties have resolved the issues between them and the consent of the parties having been given;

It is ORDERED, on this 28 day of February, 1980, that the appeal of the Appellant, Bellino's Inc., be and the same is hereby dismissed.

It is FURTHER ORDERED that the Township of Deptford shall issue the said Plenary Retail Consumption License for the period expiring June 30, 1980; and

It is FURTHER ORDERED that this Order shall not constitute a waiver of the right of the Township to institute independent action for a cause against the Plenary Retail Consumption License of the said Bellino's, Inc.

\_\_\_\_\_  
Robert W. Scott  
Administrative Law Judge

We consent:

LARIO AND NARDI  
Attorneys for Bellino's, Inc.

By: \_\_\_\_\_  
Joseph M. Nardi, Jr.

HERMAN, PEARSON, CRASS & BARRY, P.A.  
Attorneys for Township of Deptford

By: \_\_\_\_\_  
Martin A. Herman

This recommended decision may be affirmed, modified or rejected by the Director of the Division of Alcoholic Beverage Control, Joseph W. Lerner, who by law is empowered to make a final decision in this matter. However, if the Director does not so act in forty-five (45) days and unless such time limit is otherwise extended, this recommended decision shall become a final decision in accordance with N.J.S.A. 52:14B-1, et seq.

I HEREBY FILE with Joseph W. Lerner, my Initial Decision in this matter and the record in these proceedings.

3. DISCIPLINARY PROCEEDINGS - PURCHASED ALCOHOLIC BEVERAGES FROM AN UNAUTHORIZED SOURCE WHILE ON THE NON-DELIVERY LIST - LICENSE SUSPENDED 20 DAYS.

In the Matter of Disciplinary Proceedings against

Copa De Oro, Inc. 610 Raymond Boulevard Newark, N.J.

CONCLUSIONS

AND ORDER

Holder of Plenary Retail Consumption License No. 0714-33-173-001 issued by the Municipal Board of Alcoholic Beverage Control of the City of Newark.

S-12,269 X-52,403-B 54,618-A

Charles J. Mysak, Esq., Deputy Attorney General for Division.

Initial Decision Below

Hon. Gerald I. Jarrett, Administrative Law Judge

Dated: February 6, 1980 - Received: February 8, 1980

BY THE DIRECTOR:

No written Exceptions were filed by the parties hereto pursuant to N.J.A.C. 13:2-19,6.

As noted in the Initial Decision below, neither the licensee nor its attorney appeared at the hearing, although duly served with notice thereof.

Having carefully considered the entire record herein, including the transcript of the testimony, the exhibits and the Initial Decision, I concur in the findings and conclusions of the Administrative Law Judge insofar as he concludes that the charges herein have been established by a fair preponderance of the credible evidence.

However, the Administrative Law Judge (orders) "that the Director of the Division of Alcoholic Beverage Control take the necessary steps and impose the necessary penalties in this particular instance." This recommendation is clearly inadequate, and, indeed, is not in accordance with the obligation of the Administrative Law Judge to recommend a specific penalty as required by the Administrative Procedure Act.

Licensee has a prior adjudicated record of a 15 day suspension effective January 3, 1977 for prohibited Sunday sales.

I shall suspend the subject license for 20 days, to which will be added 5 days for a prior dissimilar violation which occurred within the past 5 years, making a total of 25 days.

Accordingly, it is, on this 24th day of March, 1980,

ORDERED that Plenary Retail Consumption License No. 0714-33-173-001 issued by the Municipal Board of Alcoholic

Beverage Control of the City of Newark to Copa De Oro, Inc. for premises 610 Raymond Boulevard, Newark be and the same is hereby suspended for 25 days, commencing at 2:00 a.m., Monday, April 7, 1980 and terminating at 2:00 a.m. on Friday, May 2, 1980.

JOSEPH H. LERNER  
DIRECTOR

APPENDIX

Initial Decision Below

In the Matter of:	)	
COPA DE ORO, INC.	)	<u>INITIAL DECISION</u>
	)	OAL DKT. NO. A.B.C. 5715-79
	)	Agency Dkt. No. S-12,269

Appearances:

Charles Mysak, Deputy Attorney General  
representing the Division of Alcoholic  
Beverage Control

BEFORE THE HONORABLE GERALD I. JARRETT, A.L.J.:

This is a hearing concerning the alleged violation by Petitioner of N.J.A.C. 13:2-39.4 and N.J.A.C. 13:2-23.12. The Petitioner is the holder of Plenary Retail Consumption License No. 0714-33-173-001 located at 610 Raymond Boulevard, Newark, New Jersey. Said violations allegedly occurred on March 7, 1979.

Petitioner was served a notice of the alleged violations on June 12, 1979 and an answer was filed, entering a plea of not-guilty on June 27, 1979 with the Director of the Division of Alcoholic Beverage Control. The matter was transmitted to the Office of Administrative Law for determination as a contested case pursuant to N.J.S.A. 52:14F-1 et seq. The hearing was held on January 28, 1980 and the Petitioner and his attorney failed to appear.

The issues of the hearing are:

1. Whether or not on March 7, 1979 Petitioner had in his possession on his licensed premises alcoholic beverages purchased at a time when his name appeared on a non-delivery list and having not obtained written authorization from the Director for such purchase or delivery.

2. Whether he had in his possession on his licensed premises alcoholic beverages purchased or obtained from unauthorized sources.

The State presented one witness, Inspector Wilbur J. McNeil. Inspector McNeil testified that he had been with the New Jersey Division of State Police as a Senior Inspector for 10 years and that on March 7, 1979 he had an occasion to visit 610 Raymond Boulevard in the City of Newark, which was trading as the Copa De Oro Tavern. The purpose of his visit was to determine whether or not said establishment was still doing business since it had been on the non-delivery list since August 1977, and had not requested authorization from the Director of the Division of Alcoholic Beverage Control for permission to make purchases.

Upon arriving at the premises he observed that the Petitioner had liquor on the bar as well as an extensive inventory. Upon further examination, the existing inventory was noted as consisting of 23 half gallon sealed bottles of various types of liquor as well as 52 12 ounce bottles of Miller and 92 12 ounce bottles of Heineken.

The owner of the establishment, Hector Vasquez was questioned with regard to how he had obtained the inventory and admitted that he had purchased the beer from Home Liquors on Market Street and the alcoholic beverages from Mr. Morales, a liquor salesman from J & J Corporation. The arrangement with Mr. Morales was that he would place his order with Mr. Morales and Mr. Morales would then have the alcoholic beverages delivered to the Sports Club on Fleming Avenue in the City of Newark. Upon receiving his goods, he was given one week to pay for same. In addition he admitted to having 59 open quart bottles, litres and half gallons as well as 23 sealed bottles of various sizes, excluding the half gallons previously testified to. Also he admitted that a container found empty on the premises had previously contained 12 4/5 bottles of Felipe Brandy, which he had obtained from the Sports Club as a result of an order placed with Mr. Morales. Finally it was admitted that Mr. Morales had advised him that it was a violation of the Alcoholic Beverage Control rules and regulations to sell or deliver alcoholic beverages to him and suggested that the orders be picked up at the Sports Club.

There was no rebuttal as to any of the testimony presented.

Therefore, based on a review of the entire record in this case, the  
COURT FINDS:

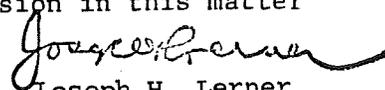
1. That on March 7, 1979 Inspector Wilbur J. McNeil visited the premises known as Copa De Oro and while on the premises did observe full and partially filled bottles of alcoholic beverages as well as bottles of beer.
2. That on or about March 7, 1979 the licensed premises was on the non-delivery list and had not obtained written authorization from the Director to purchase or receive any deliveries.

Therefore, THE COURT CONCLUDES that Copa De Oro, Inc. located at 610 Raymond Boulevard, Newark, New Jersey was operating in violation of N.J.A.C. 13:2-39.4 and 13:2-23.12. The court makes this conclusion based upon the testimony presented and the failure of Petitioner to rebutt same.

It is HEREBY ORDERED that the Director of the Division of Alcoholic Beverage Control take the necessary steps and impose the necessary penalties in this particular instance.

This recommended decision may be affirmed, modified or rejected by the Director of the Division of Alcoholic Beverage Control, Joseph H. Lerner, who by law is empowered to make a final decision in this matter. However, if the Director of the Division of Alcoholic Beverage Control does not so act in forty-five (45) days and unless such time limit is otherwise extended, this recommended decision shall become a final decision in accordance with N.J.S.A. 52:14B-10.

I HEREBY FILE with the Director of the Division of Alcoholic Beverage Control, Joseph H. Lerner, my Initial Decision in this matter and the record in these proceedings.

  
Joseph H. Lerner  
Director